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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 1188

CHARLES A. SHADID, FARRIS SHANBOUR, SEYMORE LESOWITZ, BEVERLY R. LESOWITZ,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY, a municipal corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

ROY H. SEMTNER
Municipal Counselor
WALTER M. POWELL
Assistant Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Counsel for Respondent

April, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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OPINIONS BELOW

The opinion and judgment of the District Court of Oklahoma County, Oklahoma, and the opinion and judgment of the Supreme Court of the State of Oklahoma are reported by petitioners and attached as Appendix A and B of their Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma, therefore are not reprinted herein. The answer brief of petitioners, Petition for Rehearing and Second Petition for Rehearing in the Oklahoma Supreme Court, referred to herein, being a part of the record of proceedings previously forwarded to this Court by the Clerk of the Oklahoma Supreme Court, are, therefore, not reprinted herein.

JURISDICTION

Essentially the question before this Court is one of jurisdiction. It is respectfully submitted that this Court does not have jurisdiction since the petitioners (until Petition for Rehearing) did not substantially present or rely upon a Federal question in their evidence in the trial court nor in their Answer Brief in the Oklahoma Supreme Court other than a mere allegation that the action of the City of Oklahoma City was in violation of the United States Constitution and the Constitution of the State of Oklahoma citing no specific sections of the United States Constitution nor relying on same in the trial court or in their Answer Brief before the Oklahoma Supreme Court.

The judgment entered in the Oklahoma Supreme Court is based upon independent, non-Federal grounds, sufficiently broad to sustain the decision. There was no Federal question decided which was necessary or essential to the determination of the cause and no judgment was rendered which could not have been so rendered without deciding a Federal question.

QUESTIONS PRESENTED

1. May a petitioner who does not substantially present and rely upon a Federal question in the trial court and in the Answer Brief before a State Supreme Court later specifically urge same in the Petition for Rehearing before the State Supreme Court, and in its Petition for a Writ of Certiorari to the Supreme Court of said State?

2. Whether a question of fact in evidence presented in the trial court and reviewed by the State Supreme Court which presents no Federal question is reviewable by this Court?

3. Whether a judgment of a State Supreme Court in which no Federal question was decided which was necessary or essential to determination of the cause and in which it was not necessary to decide a Federal question in order to render said judgment, is reviewable by this Court?

STATEMENT OF THE CASE

In this action the petitioners seek to vacate a decision of the Supreme Court of the State of Oklahoma (Appendix B to Petition) which reversed the trial court in said matter. Petitioners contend that condemnation proceedings filed by respondent were filed in violation of the Constitution and laws of the State of Oklahoma and the Constitution of the United States in that "respondent had and has no contemplated use of the property involved for airport purposes, but that the land sought to be so acquired by respondent in Eminent Domain was purely for private purposes."

Petitioners' main contention in the trial court and their Answer Brief before the Oklahoma Supreme Court was not as to the Federal question urged before this Court. Rather, petitioners mainly limited their argument to their interpretation of the weight to be given evidence as to the "public necessity or purpose" for respondent exercising its power of Eminent Domain. Petitioners interpret segments of testimony in the trial court to indicate a private purpose rather than public one. Petitioners urged this same position before

the Oklahoma Supreme Court, which judicially chose to view *all* of the evidence introduced before the trial court including sections of the Oklahoma Statutes (*i.e.*, 3 O.S. 1961, § 61 and 65.2 Subdivision (a) and 65.5) which are quoted in the opinion of said Court rendered therein (Appendix B to Petition). Petitioners have chosen to ignore any reference to said statutes in their briefs just as they have chosen to ignore the adequate evidence introduced in the trial court showing "public purpose or necessity." Said evidence is quoted from the trial court record by the Oklahoma Supreme Court for petitioners' edification in its opinion. (xii-xv of Appendix B to Petition.)

The order of the Oklahoma Supreme Court entered October 4, 1966 (Appendix B to Petition) dealt with procedural matters of an evidenciary nature upon which due process has been afforded petitioners with no specific Federal question having been specifically asserted or relied upon or which would have been necessary to a decision in the matter.

ARGUMENT

This case involves procedural matters of an evidenciary nature in the State of Oklahoma. In the trial court and in the appeal to the Oklahoma Supreme Court the petitioners relied on local law until the Oklahoma Supreme Court ruled adversely to their contentions and then on Petition for Rehearing the petitioners tardily relied on a Federal question.

No Federal question however, is involved since there is no allegation that the provisions of the Oklahoma Consti-

tution relating to condemnation actions are contrary to or in any manner contravene the United States Constitution. As previously pointed out to this Court, the petitioners' whole argument boils down not to a Federal question but to the fact that they believe their evidence in the trial court showed there was no public necessity for the taking of their properties in condemnation. The Oklahoma Supreme Court viewed the evidence otherwise and held the petitioners had failed to overcome by other evidence the respondent's *prima facie* case of necessity for a public purpose (Appendix B to Petition).

A question of conflicting or insufficient evidence, being a procedural matter and one involving local law which is not alleged to be in conflict with the United States Constitution, involves principles which do not present any question for this Court.

I.

There is no important question of Federal Law.

Petitioners in the Answer Brief before the Oklahoma Supreme Court urged provisions of the Oklahoma Constitution; however, they did not contend that these provisions of the Oklahoma Constitution were contrary to or in conflict with similar provisions of the United States Constitution.

This case was litigated and decided entirely on local law, without reference to rights claimed under the Constitution of the United States.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway Company*, 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510:

"1. The asserted right to just compensation for improvements in eminent domain proceedings does not necessarily present a question under U. S. Const., 14 Amend., so as to sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state, denying such right, where due process of law, including just compensation for property taken for public purposes, is guaranteed by the state laws and Constitution, and the case might well have been litigated wholly upon local law."

Southwestern Bell Telephone Company v. *State of Oklahoma*, 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528:

"2. It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, that the Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it."

Ward v. *Board of County Commissioners of Love County, Oklahoma*, 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419:

"A judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed when such grounds are not plainly untenable."

Hooker v. *City of Los Angeles*, 188 U.S. 314, 47 L.Ed. 487, 23 S.Ct. 395:

"2. The construction by a state court of a law of the state as authorizing the court to try and determine

in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court of the United States on writ of error to that court.

"3. A decision of a state court in condemnation proceedings is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby, or property taken without just compensation, where there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument."

The Oklahoma Supreme Court decided this case on independent non-Federal grounds which are sufficiently broad to sustain the decision.

Petitioners' issue raised concerning Special Masters appointed by the Oklahoma Supreme Court to assist in an advisory capacity, not involving a Federal question, is treated separately under Proposition III herein.

II.

Petitioners have waived their right to urge a Federal question.

In the trial court the petitioners presented their case on the theory of lack of public necessity by respondent in the attempted taking of petitioners' property through condemnation. The Exceptions to Report of Commissioners filed in the trial court by petitioners (R. 50-58) merely mentions the United States Constitution without specific reference to any article or section.

In their Answer Brief in the Oklahoma Supreme Court (See Answer Brief Index i-iii) the petitioners relied entirely and exclusively on the Oklahoma Constitution and not on any Federal question or any article or section of the United States Constitution.

Consolidated Turnpike Company v. Norfolk & Ocean View Railway, 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510, at page 512 of the Supreme Court Reporter, the United States Court holds:

> "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. Crowell v. Randell, 10 Pet. 368, 398, 9 L.ed. 458, 470; Simmerman v. Nebraska, 116 U.S. 54, 29 L.ed. 535, 6 Sup.Ct. Rep. 1186; Erie R. Co. v. Purdy, 185 U.S. 148, 153, 46 L.ed. 847, 850, 22 Sup.Ct.Rep. 605."

Beck v. Washington, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955:

> "12. The Supreme Court of the United States cannot entertain a question not raised in the state court below nor actually decided by that court."

16 Am.Jur.2d, Con. Law, Section 115, states in part:

> "* * * An appellant who fails to argue a constitutional contention in his brief, merely setting it forth in one sentence, is considered to have abandoned or waived such contention. * * *"

The opinion of Justice Irwin for the Oklahoma Supreme Court (Appendix B of Petition) decided the case on

adequate non-Federal grounds; that the respondent city had proved a reasonable necessity for the taking of the land. The first discussion by petitioners of the United States Constitution or a Federal question wherein a specific section of same was cited or relied upon was in their Petition for Rehearing and Brief in Support Thereof.

St. Louis & San Francisco Railroad Company v. *Shepherd*, 40 Okla. 589, 139 Pac. 833, on appeal, 240 U.S. 240, 60 L.Ed. 622, 36 S.Ct. 274, holds:

> "1. A Federal question first set up and asserted in a petition for rehearing after the judgment in the trial court had been affirmed by the highest court of the state will not support the jurisdiction of the Federal Supreme Court on writ of error, where the petition was not entertained, but was denied, without passing on the Federal question thus tardily raised."

Bilby v. *Stewart*, 55 Okla. 767, 153 Pac. 1173, on appeal, 246 U.S. 255, 62 L.Ed. 701, 38 S.Ct. 264, states:

> "Where plaintiffs in error did not raise any federal question until their second petition for rehearing, after the state Supreme Court had affirmed a judgment on an adequate nonfederal ground, the question was raised too late for consideration on writ of error sued out from the United States Supreme Court."

The Oklahoma Supreme Court denied the Petition for Rehearing without the necessity of deciding the alleged Federal questions which though tardily raised, were not applicable to the issues of law as presented to the trial court. See Orders of the Oklahoma Supreme Court dated December 27, 1966, denying the Petition for Rehearing and

Order dated February 28, 1967, denying the Second Petition for Rehearing; therefore Petitioners are precluded from urging a Federal question.

III.

The opinion rendered by the Oklahoma Supreme Court, with assistance from a panel of three attorneys appointed in an advisory capacity, not being contrary to state law and no state law being in conflict with the Constitution of the United States, presents no question to be decided by this Court.

Petitioners' question (No. 5 presented at page 3 of Petition) whether they have been deprived of property without due process of law inasmuch as the opinion and judgment resulted from a preliminary advisory opinion of a panel of three private attorneys, "there being no authority in the Constitution and laws of the State of Oklahoma authorizing any private attorney, or panel of private attorneys, to prepare an opinion for the Supreme Court, advisory or otherwise." We would respectfully submit, likewise, that petitioners have not cited any Oklahoma law prohibiting same. By a round-about method of relying upon definitions of certain words from Webster's Collegiate Dictionary, Fifth Edition, petitioners make an assertion that if carried to its full conclusion would prevent even the attorneys for each side, the judge's law clerk or any other person entitled to be heard from stating their position and advising as to the law in regard to the issues involved, for in so doing one would most certainly be offering "an influence by suggestion" to the Court, which petitioners must presume amounts to prejudice. We would submit that the foregoing is not a proper nor logical definition of the meaning of the word "prejudice" as used in Article 2, Section 6

of the Oklahoma Constitution (page 4 of Petition). For many years, it is submitted, the Oklahoma Supreme Court has had the assistance of law clerks, as do many other courts, to help in the matter of research. At times, and for many years past, in order to avoid unusual delay, Supreme Court commissions have been appointed by the Governor of the State to help with the blacklog of cases pending in said Court. In the instant situation the panel of attorneys, appointed as Special Masters by the Court after recommendation by the Oklahoma Bar Association (Appendix B, page xviii of Petition) served in an advisory capacity. The case was assigned to Justice Pat Irwin, for review and study, after which and upon consideration by the Court, the opinion was adopted. No allegation has been made by petitioners that the Special Masters appointed by the Court were interested parties. The questioned assistance, similar to research performed by the Judge's law clerk, it is urged is not the "prejudice" one would logically envision under Article 2, Section 6. 30A C.J.S. 524, states, "Except as limited by statute or rule of court, any matter may be referred to a master for consideration and report." citing *Mooney* v. *Petnick*, 104 N.J. Eq. 357, 145 Atl. 641; *Collins Realty Co.* v. *Sale*, 102 N.J. Eq. 486, 141 Atl. 452, *appeal dismissed*, 141 Atl. 919.

Advice to the Court in the form of an Amicus Curiae brief is also cited by respondent as being similar in nature, the right of the Court to appoint or request a lawyer, or other person, to appear and act as its adviser, being an inherent right. 4 Am.Jur.2d § 2 states:

> ". . . In order that it may have the benefit of the fullest discussion of a cause which it might otherwise

> decide erroneously, a court undoubtedly has an inherent right to appoint or request a lawyer, or other person, to appear and act as its adviser. Thus, in a proper case an amicus curiae may be appointed to aid and assist the court by the performance of certain services which are necessary to guide the court to a proper conclusion. . . ."

There being no Oklahoma law with which the appointment of Special Masters, in an advisory capacity, is in conflict, the issue does not present any question for this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROY H. SEMTNER
Municipal Counselor
WALTER M. POWELL
Assistant Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Counsel for Respondent

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